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16
17 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
18 IN AND FOR THE COUNTY OF YAVAPAI

19 STATE OF ARIZONA

20 Plaintiff,

21 vs.

22 STEVEN CARROLL DEMOCKER,

23 Defendant.

24 No. P1300CR20081339

25 Division 6

26 **MOTION TO DECLARE A.R.S. §§
27 13-4431 AND 4433(b)-(e) AND
28 ARIZONA RULE OF CRIMINAL
PROCEDURE 39(b)11
UNCONSTITUTIONAL**

(Oral Argument and Evidentiary
Hearing Requested)

29 Pursuant to Rule16 of the Arizona Rules of Criminal Procedure, due process, and
30 the Arizona and United States Constitutions, Defendant Steven DeMocker requests that
31 this Court declare Sections 13-4431 and 4433(b)-(e) of the Victims' Rights
32 Implementation Act ("VRA") and Arizona Rule of Criminal Procedure 39(b)(11)
33 unconstitutional. This Motion is supported by the following Memorandum and Points of
34 Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

The Arizona Legislature violated the Arizona Constitution by exceeding its limited rulemaking authority under the Victims' Bill of Rights ("VBR") in enacting Arizona Revised Code Sections 13- 4431 and 4433(b)-(e) of the VRA.

Sections 4431 and 4433(b)-(e) of the VRA as well as Arizona Rule of Criminal Procedure 39(b)(11) violate the United States and Arizona Constitutions because they interfere with victims' rights and contradict the Victims' Bill of Rights; they violate Mr. DeMocker's Sixth Amendment and due process rights; and the First Amendment to the United States Constitution and Article II and Section 6 of the Arizona Constitution.

BACKGROUND

The Victims' Bill of Rights ("VBR") was enacted as an amendment to the Arizona constitution in 1990 and provides for certain enumerated rights for victims of crime. Ariz. Const. art. 2, § 2.1. Among the enumerated rights are the right to be treated fairly, with respect and dignity and to be free from intimidation, harassment or abuse; the right to receive certain information upon request; the right to be present, and be heard, at criminal proceedings; the right to refuse discovery requests made on behalf of the defendant; the right to confer with prosecutors; the right to read pre-sentence reports available to the defendant pertaining to the crime; the right to receive prompt restitution from the perpetrator or perpetrators; the right to a speedy trial and prompt and final conclusion; and the right to be informed of these rights. *See* Ariz. Const. art. 2, § 2.1(A)(1)-(12). The Amendment also provides that substantive and procedural laws to define, implement, preserve and protect the rights to victims under the law may be authorized by the Legislature or by initiative or referendum. *Id.* at (D).

Pursuant to this provision, the Arizona Legislature adopted A.R.S. §§ 13-4431 and 4433 as part of the implementing statutes for the Victim's Bill of Rights which are known collectively as the Victims' Rights Implementation Act. The VRA provides, in

1 accordance with the VBR, that absent consent, a victim cannot be compelled to submit
2 to an interview by the defense. *See* A.R.S. § 13-4433(A). However, the implementing
3 statutes go much further than the Victim's Bill of Rights and create barriers to outreach,
4 contact and communication between the defense and a victim and insert the prosecutor
5 as an intermediary to the defense/victim relationship. For example, the VRA provides
6 that the defense can only initiate contact with a victim through a prosecutor's office. *Id.*
7 at (B). In another provision well beyond what is provided for under the VBR, a
8 prosecutor is not required to give the victim any written correspondence from the
9 defense. *Id.* at (C). The implementing statutes also require a prosecutor to act as an
10 intermediary between the victim and the defense in the event the victim does consent to
11 be interviewed. *Id.* at (D). A prosecutor is also permitted to attend all defense
12 interviews unless the victim directs otherwise. *Id.* And, a prosecutor is not required to
13 advise the victim that she has a right to refuse a prosecutor's presence at interviews. *Id.*
14 Finally, even if the victim decides that she does not want a prosecutor to attend a
15 defense interview, the statute permits a prosecutor to record the interview. A.R.S. §13-
16 4431, another statute purporting to implement the VBR, provides that the court is
17 required to "provide appropriate safeguards" to minimize contact between the victim,
18 the victim's immediate family or witnesses and the defendant's family and witnesses.

19 To implement the VBR and VRA, Arizona Rule of Criminal Procedure 39(b)
20 was amended by the Arizona Supreme Court in 1991. The Rule provides, consistent
21 with the VBR, that a victim has a right to refuse an interview by the defense. However,
22 the Rule, in an effort to mirror the implementing statutes, goes beyond the VBR by
23 providing that after charges are filed, "defense initiated requests to interview the victim
24 shall be communicated to the victim through the prosecutor" and the victim's response
25 "shall also be communicated through the prosecutor." Az. R. Crim. P. 39(b)(11). This
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provision is slightly more narrow than the VRA in that it prohibits only requests for interviews, as opposed to prohibiting all contact.

The Legislature violated the Arizona Constitution when it exceeded its limited rulemaking authority in enacting sections 1431 and 14433 (b)-(e) of the VRA by creating laws that do not define, implement, preserve or protect victims' rights as enumerated in the VBR. These provisions, along with Rule 39(b)(11) which was adopted to mirror the VRA, also violate both the Arizona and United States Constitutions by violating victims' rights and conflicting with the VBR; violating Mr. DeMocker's Sixth Amendment and due process rights; and violating the free speech guarantees of the First Amendment and Article II, Section 6 of the Arizona Constitution.

ARGUMENT

I. The Legislature Exceeded its Limited Authority Under the Victims' Bill of Rights in Enacting Sections 4431 and 4433(b)-(e) of the Victims' Rights Implementation Act.

The Arizona Constitution vests the power to make procedural rules exclusively with the Arizona Supreme Court. Ariz. Const. art. VI, § 5 (“The Supreme Court shall have: ... Power to make rules relative to all procedural matters in any court.”) The rulemaking power is exclusive. *See State ex rel. Collins v. Seidel*, 142 Ariz. 587, 691 P.2d 678 (1984). It includes formulation of evidentiary rules. *Barsema v. Susong*, 156 Ariz. 309, 751 P.2d 969 (1988).

The Constitution also provides that the each of the three separate branches of government shall not interfere with the providence of the others. Ariz. Const. art. III. (“no one of such departments shall exercise the powers properly belonging to either of the others”). The legislature, therefore, does not have the authority to enact a statute “if it conflicts with or ‘tends to engulf’” [the Supreme Court’s] constitutionally vested

1 rulemaking authority.” *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342, 982 P.2d
2 801 817 (1999); citing *State v. Robinson*, 153 Ariz. 191, 197, 735 P.2d 801, 807 (1987).

3 “The legislature’s power to promulgate rules under the VBR is not unlimited.”
4 *State v. Hansen*, 215 Ariz. 287, 290, 160 P.3d 166, 169 (2007). “[T]he scope of
5 legislative rulemaking power under the VBR extends to those rules that define,
6 implement, preserve, and protect the specific rights unique and peculiar to crime
7 victims, as guaranteed and created by the VBR.” *Id.* citing *State ex rel. Napolitano v.*
8 *Brown*, 194 Ariz. 340, 343, 982 P.2d 801 818 (1999); *see also Slayton v. Shumway*, 166
9 Ariz. 87, 92, 800 P.2d 590, 595 (1990) (explaining that the legislature’s rulemaking
10 authority under the VBR extends only to “procedural rules pertaining to victims and not
11 [to] the substantive general subject of the rulemaking power”). In *Champlin v.*
12 *Sargeant*, 192 Ariz. 371, 373 n.2, 965 P.2d 763, 765 n. 2 (1998) the Supreme Court
13 specified that the legislative rulemaking power under the VBR “extends only as far as
14 necessary to protect rights *created* by the [VBR] and not beyond.” (Emphasis added.)

15 A.R.S. §§ 13-4431 and 4433(b)-(e) do not “define, implement, preserve, or
16 protect” the rights enumerated by the VBR. These sections provide as follows:

- 17 • A.R.S. § 13-4433(B) provides that the defense can only initiate contact
18 with the victim through the prosecutor’s office;
- 19 • A.R.S. § 13-4433(B) requires the prosecutor to advise the victim of her
20 right to refuse a defense interview but does not require the prosecutor to
21 advise the victim that she has a right to refuse the prosecutors presence at
22 interviews;
- 23 • A.R.S. § 13-4433(C) provides that the prosecutor is not required to pass
24 along written correspondence from the defense to the victim;

- A.R.S. § 13-4433(D) requires the prosecutor to act as an intermediary between the victim and the defense in the event the victim does consent to be interviewed;
- A.R.S. § 13-4433(E) permits the prosecutor to record a victim interview even where the victim has elected that the prosecutor not attend the interview; and
- A.R.S. §13-4431 provides that the court is required to “provide appropriate safeguards” to minimize contact between the victim, the victim’s immediate family or witnesses and the defendant’s family and witnesses.

None of these provisions implement, preserve or protect the right to be treated fairly, with respect and dignity and to be free from intimidation, harassment or abuse; the right to receive certain information upon request; the right to be present, and be heard, at criminal proceedings; the right to refuse discovery requests made on behalf of the defendant; the right to confer with prosecutors; the right to read pre-sentence reports available to the defendant pertaining to the crime; the right to receive prompt restitution from the perpetrator or perpetrators; the right to a speedy trial and prompt and final conclusion; and the right to be informed of these rights.

Some provisions of the VRA are obviously for the benefit of the prosecution and not for the protection of victims’ rights. These include requiring a prosecutor to advise the victim of her right to refuse a defense interview but not likewise advising the victim that she has a right to refuse a prosecutor’s presence at interviews; granting a prosecutor complete control over what correspondence a victim receives from the defense; and permitting a prosecutor to record a victim interview even when the victim decides that that a prosecutor not attend the interview. These provisions do nothing to implement,

1 preserve or protect the rights created by the VBR and instead may in fact interfere with
2 a victims' rights.

3 The interests of victims and prosecutors are not necessarily aligned. From the
4 perspective of survivors, they are not members of the prosecution team nor clients of the
5 prosecutors. Even if they were so aligned, the VBR does not provide that a victim
6 should not be contacted by defense counsel, either in writing or otherwise. Nor does it
7 provide that a victim is not free to meet with the defense without the interference, by
8 presence or recording, of the prosecution. Yet the legislature, purportedly pursuant to
9 its authority under the VBR, places a victim entirely under the control of the
10 prosecution. The VBR does not provide, and it is not the case that a victim and the
11 defense are to be separated or mediated by the prosecutors' office.

12 There is no enumerated right under the VBR for victims to not be contacted by
13 the defense; to have a prosecutor act as an intermediary between the victim and the
14 defense in the event the victim does consent to be interviewed; or to minimal contact
15 between the victim, the victim's immediate family or witnesses and the defendant's
16 family and witnesses. The Supreme Court has held that "nothing in the Victims' Bill of
17 Rights or section 13-4433 supports the argument that victims have a blanket right to be
18 shielded from all contact with defendants or their attorneys until the time of trial."
19 *Champlin*, 192 Ariz. at 375, 965 P.2d at 767 (citing *State ex rel. Dean v. City Court*, 173
20 Ariz. 515, 516-17, 844 P.2d 1165, 1166-67 (App.1992) (holding that alleged victim may
21 be compelled to testify at pretrial hearing)). The Arizona Supreme Court has
22 acknowledged that victims are not represented by a prosecutor. *Romley v. Superior*
23 *Court In and For the County of Maricopa*, 181 Ariz. 378, 382, 891 P.2d 246, 250
24 (1995) ("[T]he rule is well established that a prosecutor does not "represent" the victim
25 in a criminal trial; therefore, the victim is not a "client" of the prosecutor.")
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1 In *Brown*, the Arizona Supreme Court *en banc* reaffirmed that the legislature
2 exceeds its rulemaking authority if a right is not explicitly created under the VBR.
3 *Brown*, 194 Ariz. 343, 982 P.2d 818. Specifically, the Court rejected as beyond the
4 power of the Legislature its attempt to shorten time limits to file petitions for post
5 conviction relief in capital cases from 120 days to 60 days in support of the VBR's
6 provision that a victim has the right "[t]o a speedy trial or disposition and prompt and
7 final conclusion of the case after the conviction and sentence." *Id.* The Court held that
8 the reference to the victim's speedy trial right in the VBR "neither creates a right nor
9 defines a right peculiar and unique to victims." *Brown*, 194 Ariz. 343, 982 P.2d 818.
10 The Court also held that the rule was not necessary to ensure the rights enumerated
11 under the Victim's Bill of Rights. *Id.* at 344, 982 P.2d 819.

12 A.R.S. §13-4431 and 4433(b)-(e) go well beyond the rights enumerated by the
13 VBR and invade the Court's rulemaking authority by controlling a defendant's ability to
14 investigate, discover and present evidence in her defense. The Court, and not the
15 legislature, is empowered to formulate its own procedural rules. *Shumway*, 166 Ariz. at
16 91, 800 P.2d at 594. As the Supreme Court noted in *Shumway*, to survive constitutional
17 scrutiny, the statutory enactment of the VBA must be limited to the rights created in the
18 statute, "if broadly construed, the rulemaking provision of [the VBA] is a separation of
19 powers provision that goes far beyond victims' concerns and therefore does not pertain
20 to the same subject as the rights provisions of the proposal." *Id.*

21 The Supreme Court has not countenanced a blanket rule prohibiting defense
22 contact with victims. Arizona Rule of Criminal Procedure Rule 39(b)(11) provides that
23 defense requests to *interview* a victim shall be communicated through the prosecutor
24 and the response shall likewise come through the prosecutor. This is not a blanket
25 prohibition such as is contained in the VRA. Rule 39 likewise does not contain the
26 following provisions that exceed the VBR: requiring a prosecutor to advise the victim of
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1 her right to refuse a defense interview but not requiring the prosecutor to advise the
2 victim that she has a right to refuse the prosecutors presence at interviews; permitting a
3 prosecutor to withhold written correspondence from the defense to the victim; requiring
4 a prosecutor to act as an intermediary between the victim and the defense in the event
5 the victim does consent to be interviewed; permitting a prosecutor to record a victim
6 interview even where the victim has elected that the prosecutor not attend the interview;
7 or providing that the court is required to "provide appropriate safeguards" to minimize
8 contact between the victim, the victim's immediate family or witnesses and the
9 defendant's family and witnesses.

10 Sections 4431 and 4433(b)-(e) of the VRA invade the Court's rulemaking
11 authority and exceed the authority granted to the legislature under the VBR. For these
12 reasons, these provisions should be stricken as unconstitutional under Articles Three
13 and Six of the Arizona Constitution.

14 **II. Sections 4433(b)-(e) and Arizona Rule of Criminal Procedure**
15 **39(b)(11) Violate Victims' Rights and Conflict with the Victim's Bill**
16 **of Rights.**

17 Under the VBR, both Katie and Charlotte DeMocker qualify as victims¹ and
18 therefore have the rights, among others, to be treated fairly, with respect and dignity; to
19 be free from intimidation, harassment or abuse; and the right to confer with the
20 prosecution. *See* Ariz. Const. art. II, §2.1,1-12. Arizona Rule of Criminal Procedure
21 39(d) requires crime victims who desire to claim notification rights and privileges under
22 Rule 39 to provide contact details to the state. Ariz. R. Crim. P. 39(d). The State is
23 then to provide that information to the court and to the defendant. *Id.* Once this
24 notification occurs, a victim is entitled to the rights under Rule 39. A.R.S. §13-4417
25 also provides that a victim shall provide a request for notice to the responsible agency.

26 ¹ "Victim" is defined in the VBR as a person against whom the criminal offense has been committed or if the
27 person is killed or incapacitated, the person's ... child ... except if the person is in custody for an offense or is the
28 accused." Ariz. Const. art. II, § 2.1(c).

Once a victim invokes her rights, she is not able to have direct communication with the defense. Both Rule 39(b)(11) and Section 4433 prohibit the defense from contacting a victim and prohibit a victim from responding directly to defense initiated contact. In this case, the Yavapai County Attorney's Office designated Katie and Charlotte DeMocker as victims under the VRA without their consent or notification. This decision automatically resulted in the Court's issuing an order prohibiting contact between Katie and Charlotte DeMocker and their father. As a result, after losing their mother, Katie and Charlotte were prohibited from visiting their father in jail or speaking to him on the phone for almost a month after he was arrested. Both Katie and Charlotte DeMocker strongly support their father, believe in his innocence, wanted to visit him, needed his support and were denied this opportunity by the unilateral actions of the State and the application of Sections 4433 and Arizona Rule of Criminal Procedure 39(b)(11).

In order to have the contact they desired with their father, both Katie and Charlotte DeMocker were required to waive their rights pursuant to Rule 39(e) and have forfeited their rights under the VBR. Stated differently, section 4433(d) and Rule 39(b)(11), which were allegedly designed to implement the VBR, violated the VBR in this insistence. The Legislature does not have the authority to restrict rights created by the people through constitutional amendment. *See State v. Roscoe*, 185 Ariz. 68, 72-73 912 P.2d 1297, 1301-02 (1996) citing *Turley v. Bolin*, 27 Ariz. App. 345, 554 P.2d 1288 (Ariz. App. 1976). *See also State v. Lamberton*, 183 Ariz. 47, 50, 899 P.2d 939, 942 (1995) (“[T]he implementing statutes and [court] rules cannot eliminate or narrow rights guaranteed by the state constitution.”); *see also Marquez v. Rapid Harvest Co.*, 1 Ariz.App. 562, 565, 405 P.2d 814, 817 (1965) (“It is our absolute duty to protect constitutional rights.”), *citing Bristor v. Cheatham*, 75 Ariz. 227, 234, 255 P.2d 173, 177 (1953)).

1 The Court on November 17, 2008 modified Mr. DeMocker's release conditions
2 to permit contact only after receiving letters from both Katie and Charlotte DeMocker
3 opting out of victim's services. This result reveals both the bias and incorrect
4 assumptions on which Section 4433(b) and Rule 39(b) are based and the basic way in
5 which these implementing statutes and rules violate the very principles they were
6 designed to protect. Victims' interests are not always aligned with the prosecution. A
7 victim should not be required to waive her rights when her interests are not so aligned.
8 This is precisely what is required by Sections 4433(b) and Rule 39.

9 The Arizona Supreme Court has invalidated provisions of the VRA and Rule
10 39(b) that conflict with the VBR. *Roscoe*, 185 Ariz. 68, 912 P.2d 1297. In *Roscoe* the
11 court invalidated A.R.S. §13-4433(f) and Rule 39(b) which provided that a peace officer
12 shall not be considered a victim. The Court held that victim is clearly defined by the
13 VBR as are exceptions, "the plain language of this new amendment provides for only
14 two types of people who are excluded from the protection of the Victims' Bill of Rights
15 ... those in custody for an offense or those who are the accused." *Id.* at 71, 912 P.2d
16 1300 (internal citations and quotations omitted). Here, as with Section 4433(f), Section
17 4433(b) seeks to exclude from victim status those who desire direct contact with the
18 defense. Section 4433(b) and Rule 39(b)(11) should be struck as violating the
19 Constitution's requirement that a victim of a crime has the right "to be treated with
20 fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse,
21 throughout the criminal justice process" and to "confer with the prosecution, after the
22 crime against the victim has been charged, before trial or before any disposition of the
23 case and to be informed of the disposition." These rights are not limited under the VBR
24 to those victims who do not want contact with the defense. "The language of the
25 constitutional provision is plain, and we may look no further." *Id.*

1 **III. Sections 4431 and 4433(b)-(e) and Arizona Rule of Criminal**
2 **Procedure 39(b)(11) Improperly Interfere with Mr. DeMocker's**
3 **Sixth Amendment and Due Process Rights.**

4 Mr. DeMocker's Sixth Amendment and due process rights require that counsel
5 fully investigate his case and have unadulterated access to witnesses so that he may
6 prepare and present a defense. A defendant has a due process right, under the federal
7 and Arizona constitutions, to present a defense. *Chambers v. Mississippi*, 410 U.S. 284,
8 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). To determine what is required to prepare a
9 present a defense in a capital case, counsel are required under Rule 6.8 of the Arizona
10 Rule of Criminal Procedure to "be familiar with and guided by" the American Bar
11 Association Guidelines for the Appointment and Performance of Defense Counsel in
12 Death Penalty Cases ("ABA Guidelines"). The ABA Guidelines have been
13 acknowledged by the Supreme Court "as 'guides to determining what is reasonable'" in
14 the representation of capital defendants. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)
15 (quoting *Strickland*, 466 U.S. at 688); see also *Williams v. Taylor*, 529 U.S. 362, 396
16 (2000). See *ABA Revised Guidelines for the Appointment and Performance of Defense*
17 *Counsel in Death Penalty Cases*, in 31 Hofstra L. Rev. 913 (2003).

18 The ABA Guidelines provide that counsel have an obligation to interview
19 witnesses to the crime. See American Bar Association, *Guidelines for the Appointment*
20 *and Performance of Defense Counsel in Death Penalty Cases* (2003) (Commentaries to
21 Guidelines 10.7 & 10.11). The ABA Guidelines provide that "defense counsel must
22 independently investigate the circumstances of the crime, and all evidence ... purporting
23 to inculcate the client." See ABA Guidelines, Commentary, Introduction. This duty
24 includes interviewing "witnesses having purported knowledge of events surrounding the
25 alleged offense itself." ABA Guidelines, 10.7(2)(a)(1). In this case, one of the
26 surviving victims is also a witness to the crime because she was reportedly on the phone
27 with Carol Kennedy when she was attacked. This victim witness is potentially a
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1 witness at both the guilt-innocence and sentencing phases of the trial, thus contact is an
2 essential part of investigating this death penalty case. The Arizona Court of Appeals
3 has held that "except in the most unusual circumstances, it offends basic notions of
4 minimal competence of representation for defense counsel to fail to interview any state
5 witnesses prior to a major felony trial." *State v. Radjenovich*, 138 Ariz. 210, 274, 674
6 P.2d 333, 227 (1983). The Arizona Supreme Court agrees. *See e.g. State v. Schultz*,
7 140 Ariz. 222, 224, 681 P.2d 374, 377 (1984).

8 As the Arizona Court of Appeals recognized long ago, the prosecution must not
9 interfere with a defense access to witnesses. "In the absence of an affirmative and
10 convincing showing of exceptional circumstances or compelling reasons, a district
11 attorney may not interfere with the pre-trial interrogation by a defense counsel of
12 persons who may be called upon as a witness in the case." *Mota v. Buchanan*, 26 Ariz.
13 App. 246, 547 P.2d 517 citing *Lewis v. Court of Common Pleas of Lebanon County*, 436
14 Pa. 296, 260 A.2d 184 (1969). *See also State v. Chaney*, 5 Ariz. App. 530, 428 P.2d
15 1004 (1967) (improper to discourage police officers from discussing case with
16 defendant's counsel just prior to testifying); *Rosser v. State*, 45 Ariz. 264, 42 P.2d 613
17 (1935) (counsel for the adversary has every legal and ethical right to call upon any
18 potential witness, prior to trial and interrogate him informally about his knowledge); *cf.*
19 *State v. Warner*, 168 Ariz. 261, 812 P.2d 1079 (1990); *see generally* Robert N. Clinton,
20 *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal*
21 *Trials*, 9 IND. L. REV. 711 (1976) (prosecutor engages in misconduct if he instructs
22 witnesses not to speak to defense counsel). The Ninth Circuit agrees that both sides
23 have the right to interview witnesses before trial. *See e.g. United States v. Cook*, 608
24 F.2d 1175 (9th Cir. 1980) (overruled on other grounds by *Luce v. United States*, 469
25 U.S. 38 (1984)). To interfere with this right there must be "clearest and most
26 compelling circumstances." *See id.* at 1180, quoting *Dennis v. United States*, 384 U.S.

1 855, 86 S Ct. 1840 (1966). Here the legislature took the right to refuse to be
2 interviewed and expanded it into an invasion of the defense right to have access to
3 witnesses.

4 Counsel is also required to seek out and interview members of the victim's
5 family under the ABA Guidelines, barring exceptional circumstances. *See* ABA
6 Guidelines, Guideline 10.7, Commentary 2(a)(4). Independent of the ABA Guideline
7 requirements, the capital defense community has come to realize that their traditional
8 view of survivors as clients of the prosecution is a mistake, both from the perspective of
9 survivors and from the perspective of defending clients zealously. *See* Richard Burr,
10 *Litigating with Victim Impact Testimony: The Serendipity that Has Come from Payne v.*
11 *Tennessee*, 88 Cornell L. Rev. 517 (2003). Unless counsel develop a relationship with
12 survivors, the defense may never know the broad and diverse range of interests and
13 needs that survivors feel and are able to articulate. The development of a relationship
14 based on respect and compassion for survivors may help survivors feel less like
15 distraught bystanders and more like real participants in a process which usually affects
16 them profoundly. *See* 88 Cornell L. Rev. 517 (2003).

17 Capital defense lawyers in the past have found it difficult to contact survivors
18 because of the anger and hostility survivors often express toward the defendant and
19 defense counsel, and because of defense counsels' perception that survivors want to
20 relate only to prosecutors and law enforcement personnel. Over the past 10 years,
21 however, capital defense counsel have learned that with expert assistance, they can be in
22 contact with survivors and that many survivors are open to contact with the defense.
23 When communication between survivors and defense teams is facilitated by someone
24 who is specially trained and knowledgeable about the trauma survivors have
25 experienced, is respectful of their needs and interests, and is skilled at working with
26 survivors and defense teams in these areas, the result is often beneficial to both. *Cf.*

1 Commentary to ABA Guideline 10.9.1 (“approaches to the victim’s family should be
2 undertaken carefully and with sensitivity” and “[defense counsel] may consider seeking
3 the assistance of . . . a defense-victim liaison . . . in the outreach effort”). With the help
4 of a defense-initiated victim liaison, a relationship can often develop between defense
5 teams and survivors that can help meet the needs of survivors and, by doing so, advance
6 the interests of the defense. For these reasons, the work of defense-initiated victim
7 liaisons has become an essential part of the defense function in capital cases.

8 Beyond permitting a victim an opportunity to refuse an interview, the suspect
9 provisions prohibit contact between the defense and a victim and require a prosecutor to
10 interfere with and control any communication between the defense and a victim. These
11 provisions giving exclusive access to the prosecution also pose a risk that the prosecutor
12 may improperly interfere with a victim’s decision to grant a defense request to meet or
13 for an interview. The prosecution and defense are necessarily at odds and the
14 prosecution has every incentive to discourage a relationship between the defense and the
15 victim. Section 4431 and 4433(b)-(e) and Arizona Rule of Criminal Procedure
16 39(b)(11) directly conflict with counsels’ obligations under the Sixth Amendment, due
17 process, the ABA Guidelines and Rule 6.8 of the Arizona Rules of Criminal Procedure.

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19 **IV. Section 4433(b)-(e) and Arizona Rule of Criminal Procedure 39(b)(11)**
20 **Violate the First Amendment of the United States’ Constitution and**
21 **Article II of the Arizona Constitution.**

22 The provisions of the VRA and Rule 39(b)(11) violate the First and Fourteenth
23 Amendments of the United States Constitution as well as Article II, §§ 4 and 6 of the
24 Arizona Constitution because they are facially overbroad, not the least restrictive means
25 and are an invalid prior restraint on speech. A.R.S. § 13-4433(B) provides that the
26 defense “shall only initiate contact with the victim through the prosecutor’s office” and
27 thereby prohibits all direct contact between a victim and the defense. Arizona Rule of
28 Criminal Procedure 39(b)(11) provides that “defense initiated requests to interview the

1 victim shall be communicated to the victim through the prosecutor” and “[t]he victim’s
2 response ... shall also be communicated through the prosecutor.”

3 The First Amendment to the United States Constitution provides:
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5 Congress shall make no law respecting an establishment of religion, or
6 prohibiting the free exercise thereof, or abridging the freedom of speech,
7 or of the press; or the right of the people peaceably to assemble, and to
8 petition the government for a redress of grievances.

9 Arizona’s Constitution provides that “[e]very person may freely speak, write and
10 publish on all subjects, being responsible for the abuse of that right.” Ariz. Const. art.
11 II, §6.

12 **1. A.R.S. §13-4433(b) and Rule 39(b)(11) Are Overbroad Restraints on
13 Free Speech.**

14 The overbreadth doctrine states that a law regulating speech is overbroad “if it
15 sweeps within its ambit a substantial amount of protected speech along with that which
16 it may legitimately regulate.” *Kolender v. Lawson*, 461 U.S. at 359, n.8; *Gooding v.*
17 *Wilson*, 405 U.S. 518, 521-22 (1972). A two-part test is used to determine if a statute
18 violates the overbreath doctrine. First, no state action impinging on free speech will be
19 sustained unless the government asserts a compelling interest to justify the
20 impingement. *See NAACP v. Alabama*, 357 U.S. 449, 463 (1958). Second, the state
21 may not prohibit broad classes of speech, if in so doing, a substantial amount of
22 constitutionally protected speech is also prohibited.

23 Section 4433(b) and Rule 39 satisfy the first prong of the overbreadth analysis. Their
24 primary purpose is to guarantee that crime victims be “treated with fairness, respect and
25 dignity” and that they be “free from intimidation, harassment or abuse.” The State’s
26 interest in protecting victims of crime may constitute a compelling governmental
27 interest sufficient to justify some impingement on free speech. However, the Supreme
28 Court has consistently held that the state may not prohibit broad classes of speech, even

1 when some of what is proscribed may indeed be legitimately regulated, if a substantial
2 amount of constitutionally protected speech is likewise prohibited. Section 4433(b) and
3 Rule 39(b)(11) fail to satisfy this second prong of the overbreadth analysis.

4 These provisions assume that in order to protect victim's rights, all contact between
5 the victim and the defense must be prohibited. This is simply not true. The Federal
6 Crime Victim's Rights Act of 2004, codified at 18 U.S.C. § 3771, provides victims'
7 with the right to be treated with "fairness and with respect for the victim's dignity and
8 privacy." 18 U.S.C. § 3771(a)(8). Other rights are enumerated including the right to be
9 protected from the accused; the right to reasonable, accurate and timely notice of court
10 proceedings; the right to be heard, to restitution, and to confer with the attorney for the
11 Government; among others. *Id.* at (1)-(8). The Federal statute does not prohibit contact
12 between victims and the defense. In fact, defense initiated victim outreach is often
13 conducted in federal and other state cases and is contemplated by the ABA Guidelines.

14 Contact by defense counsel is constitutionally protected speech for which the
15 government has no compelling interest to justify such an absolute restriction. *Cf. Talley*
16 *v. California*, 362 U.S. 60 (1960) (invalidating an ordinance prohibiting the distribution
17 of handbills because the breadth of its application went far beyond what was necessary
18 to achieve a legitimate governmental purpose.) The *Talley* Court noted that although the
19 ordinance was aimed at providing a way to identify those responsible for fraud, false
20 advertising and libel; the ordinance was not limited. The Court held that the statute's
21 interference with First Amendment freedoms went beyond what might be justified in the
22 exercise of the State's legitimate interest. Section 13-4433 prohibiting all defense
23 contact and Rule 39(b)(11) prohibiting all direct interview requests are likewise not
24 narrowly tailored to further the State's interest in protecting victims of crime from
25 further abuse. These provisions prohibit defense counsel from initiating any contact
26 with a victim.

Moreover, the Supreme Court has consistently held that statutes restricting speech solely on the grounds that it is offensive or unseemly are unconstitutionally overbroad. For instance, in *City of Houston v. Hill*, 482 U.S. 451 (1987), *appeal dismissed, cert. denied*, 483 U.S. 1001 (1987), the Court struck down an ordinance making it unlawful for any person to “strike or in any manner oppose, molest, abuse or interrupt any policemen in the execution of his duty.” The Court reasoned that because the statute prohibited citizens from criticizing and insulting police officers which was constitutionally protected speech, the ordinance was overbroad. The fact that the statute also has a legitimate application in prohibiting conduct which is unprotected by the First Amendment was not enough to save it. Section 4433(b) and Rule 39(b)(11), likewise, sweep within their ambit a substantial amount of protected speech along with what might be legitimately regulated speech. Because they restrict both constitutionally protected and unprotected expression, they are constitutionally overbroad. The State may not expansively prohibit classes of speech in so broad a manner as to include both constitutionally protected and unprotected speech. Legislation which does so is overbroad and, accordingly, Section 4433(b) and Rule 39(b)(11) are overbroad. Mere overbreadth, however, is not sufficient to overturn legislation on constitutional grounds. It must be substantially overbroad.

2. Neither Section 13-3344(b) Nor Rule 39(b)(11) Are the Least Restrictive Alternative.

If a legitimate governmental objective can be achieved by means which are less burdensome on First Amendment expression than the means selected, government must use the less burdensome means. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (footnote omitted). Section 13-4433(B) and Rule 39(b)(11) prohibit not only the defendant, but defense counsel or any other person acting on behalf of the defendant, from initiating contact with a victim (4433(b)) or to request an interview (Rule 39(b)(11)). The State's

1 legitimate interest in protecting victims can be achieved by means less restrictive than
2 an expansive prohibition on any member of the defense contacting the victim.

3 Moreover, the State's interest in protecting victims from abuse can be realized
4 without prohibiting defense counsel from contacting the victim. This objective can be
5 attained by limits provided for under Arizona Rule of Criminal Procedure 39(b)(12) (a
6 victim may specify a reasonable date, time, duration and location for an interview or
7 deposition and may terminate the contact if not done in a dignified and professional
8 manner.) The VBR is aimed at assuring that victims of crime will be "treated with
9 fairness, respect, and dignity", and that they be free from "harassment intimidation, or
10 abuse." Section 4433(b) and Rule 39(b)(11), however, are not so limited, and mandate
11 that all contact by any member of the defense be suppressed. Such a generality is too
12 remote to furnish a constitutionally acceptable justification for this all-embracing
13 infringement on free speech.

14 Section 3344(b) and Rule 39(b)(11) are not narrowly tailored to serve the State's
15 interest in protecting victims' rights as enumerated in the VBR, but encompass all
16 classes of speech, including a substantial amount of constitutionally protected speech.
17 Nor are they the least restrictive alternatives for advancing such interests. The objective
18 of protecting crime victims from harassment or abuse by defense counsel does not
19 justify prohibiting defense counsel from contacting the victim. The provisions'
20 sweeping prohibitions are a substantially overbroad invasion of protected speech that
21 cannot be justified by the governmental interest in protecting crime victims from
22 harassment, abuse or intimidation. Thus, the provisions fail under an overbreadth
23 analysis.

24 **3. Section 4433(b) and Rule 39(b)(11) Are Unlawful Prior Restraints on**
25 **Free Speech.**

26 In determining the extent to which government may constitutionally interfere
27 with free speech, a unanimous Supreme Court declared, that "[t]he question in every
28

1 case is whether the words used are used in such circumstances and are of such a nature
2 as to create a clear and present danger that they will bring about the substantive evil that
3 Congress has a right to prevent. It is a question of proximity and degree.” *Schenck v.*
4 *United States*. *Schenck v. United States*, 249 U.S. 47, 52 (1919). The Court held that to
5 justify suppression of free speech there must be reasonable grounds to fear that serious
6 evil will result if free speech is practiced and that the danger apprehended is imminent.
7 *Whitney v. California*, 274 U.S. 357, 376 (1927). An “undifferentiated fear or
8 apprehension of disturbance” is not enough to overcome the right to free expression.
9 *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969).
10 There must be a clear and present danger that the conduct itself will bring about the
11 substantive evil, and the substantive evil likely to result must be extremely serious and
12 the degree of imminence extremely high before government may abridge free speech.
13 *See Whitney v. California*, 274 U.S. 357, 374-376 (1927) (Brandeis, J., concurring).
14 Thus, the rule emanating from the “clear and present danger” cases is that the
15 substantive evil sought to be avoided must be extremely serious and the degree of
16 imminence high before government action limiting speech will be sanctioned. *Bridges*
17 *v. California*, 314 U.S. 252, 263 (1941).

18 The supposed evils that Section 4433(b) and Rule 39(b)(11) seek to obviate are not
19 sufficiently exigent to warrant suppression of free speech. The requirement that a
20 defense attorney's contact with a victim be channeled through the prosecutor
21 presupposes that a victim is somehow harmed by direct contact with the defense
22 attorney. However, it is not true that direct contact by the defense causes harm to the
23 victim. Accordingly, the State is imposing prior restraints based merely upon an
24 “undifferentiated fear or apprehension of disturbance.” *Tinker v. Des Moines Indep.*
25 *Community School Dist.*, 393 U.S. 503, 508 (1969).
26
27
28

1 In addition to infringing on free speech as protected by the U.S. Constitution, the
2 Victims' Rights Implementation Act violates Article II, Section 6 of the Arizona
3 Constitution. Arizona's free speech provision is generally interpreted to guarantee even
4 broader free speech rights than those conferred by the United States Constitution.
5 "[A]ny system of prior restraints ... comes to the Court bearing a heavy presumption
6 against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 70.
7 Section 4433(b) and Rule 39(b)(11) should be struck as violating the United States and
8 Arizona Constitutions.

9
10 **CONCLUSION**

11 For these reasons, Mr. DeMocker requests that this Court declare Section
12 4433(b)-(e) and Arizona Rule of Criminal Procedure 39(b)(11) unconstitutional.

13 DATED this — day of October, 2009.

14
15
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25 ORIGINAL of the foregoing filed
26 this ~~27~~ day of October, 2009, with:

27 Jeanne Hicks,
28

1 Clerk of the Court
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3 120 S. Cortez
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5 COPIES of the foregoing hand delivered
6 this 21 day of October, 2009, to:

7 The Hon. Thomas B. Lindberg
8 Judge of the Superior Court
9 Division Six
10 120 S. Cortez
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12 Joseph Butner, Esq.
13 Office of the Yavapai County Attorney
14 Prescott courthouse drawer

15 
16 _____

17 COPY of the foregoing has been sent
18 by U.S. Mail this 21 day of October,
19 2009 to:

20 Terry Goddard, Arizona Attorney General
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22 1275 W. Washington
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24 Hon. Jim Weiers, Speaker
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